United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-7237

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

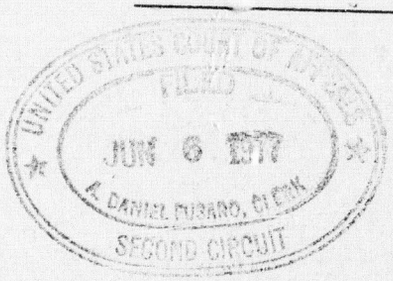
BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

V.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, AND WILLIAM J. RONAN, W.
PAUL STILLMAN, JAMES G. HELLMUTH,
VICTOR R. YANITELLI, MILTON A. GILBERT,
HOWARD SCHULMAN, ROBERT F. WAGNER,
JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN,
JOSEPH F. CULLMAN, III, ALAN SAGNER,
Defendants-Appellants

On Appeal From Order of United States District Court
For the Southern District of New York,
Judge Milton Pollack

BRIEF OF AMICI CURIAE TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, ET. AL.



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v.	:	77-7237
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL., Defendants-Appellants	:	

BRIEF OF THE TOWN OF HEMPSTEAD, INCORPORATED VILLAGES OF CEDARHURST, LAWRENCE, AND ATLANTIC BEACH, AND ROBERT CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY AS AMICI CURIAE

The Town of Hempstead, Incorporated Villages of Cedarhurst, Lawrence, Atlantic Beach, and individuals, Robert Check, Mona Gottesman, and Herbert Warshavsky have been invited to participate in this cause as amici curiae pursuant to the order of this Honorable Court dated June 1, 1977, in support of the Port Authority.

PREEMPTION REJECTED BY ALL BRANCHES OF GOVERNMENT

EXECUTIVE

From the documents presented by the parties there is a consistency of expression from the responsible spokesman

for the Executive branch of the Government that the airport proprietor has not been preempted by the federal government of its right to determine what service it will furnish aircraft provided such determination is neither discriminatory nor constitutes an unreasonable burden upon interstate or foreign commerce.*

LEGISLATIVE

There is no evidence in this record that the Congress intended to preempt the airport proprietor of the thus limited exercise of this proprietary power. Only the assertions of the counsel for the airlines is to the contrary. The law is clear that these ipse dixits of counsel are not evidence and are entitled to little or no weight. The burden is upon the airlines to establish preemption. It should not be forgotten that Secretary Coleman made it clear that he was not acting pursuant to Sect. 611 (49USC1431). Hence, there was no exercise by him of the alleged preemption authority discussed in City of Burbank v. Lockheed Terminal (infra).

JUDICIAL

The Supreme Court of the United States has not passed upon the scope of these proprietary powers of an airport owner, but the court has unmistakably recognized the fact of the existence of this power and authority of the airport proprietor

*In February 1975, the EPA submitted recommended noise standards (con't)

in footnote 14 page 635-636 of its decision in City of Burbank v. Lockheed Air Terminal 411 U.S. 624 (1973). The fact that the Supreme Court recognized that this power and authority exists in airport proprietors, after the Court had found from the legislative history of 49 USC 1431 and 1972 amendments to it that Congress has preempted the field of control of noise by the exercise of police power, it is highly significant that such power and authority continues to exist. Only the extent and scope of such power remains to be determined. It is clear that such airport proprietor authority and power has not been preempted by Congress either expressly or by implication. The case of National Aviation v. City of Hayward 418 F. Supp. 417 (N.D. Cal. 1976) confirms the existence of this authority and its proper exercise.

The airlines deprecate references to expressions by the President of the United States and the Secretaries of Transportation, made in press conferences, to the effect that airport proprietors have, in some instances, the power and authority to exclude certain aircraft from using their facilities. This is a normal medium of expression for such personages. Up to this time, there has been no occasion for a more formal medium. In every instance where any expression of this

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to the FAA which recognized these same rights of an airport proprietor (JA. 65 fn. 27), to reject the SST Aircraft.

subject has been made, there can be no doubt that this power and authority of the airport proprietor does exist and is respected.

Since all three branches of Government recognize the present existence of these rights and powers of an airport proprietor, it becomes difficult to conclude that such rights have been preempted.

REASONS FOR REJECTING PREEMPTION

A.

The charge has been made that the Federal Government is not prepared to assume liability under the doctrine of Griggs v. Allegheny County 369 U.S. 84 (1962) hence the federal government has rejected the preemption urged by the airlines. This may or may not be so. Regardless of the reason, total preemption has been urged upon the Department of Transportation, considered by it, and flatly rejected (JA. II-34). More relevant, however, is the recognition by the Executive branch of the government that the complexity of the problem of noise calls for a cooperative effort by the federal government, airport proprietors, state and local governments, air carriers, and local residents (JA. II-2).

The noise problem is not one which, in fact and by necessity, imperatively demands one uniform rule, regulation, or system. That this is true is confirmed by the Introduction to Aviation Noise Abatement Policy November 18, 1976, signed by Secretary William T. Coleman, Jr. and Federal Aviation Administrator John L. Mc Lucas, in which it is stated:

> "Those who anticipate a complete federal solution to the aircraft noise problem misunderstand the need for federal, local and private interaction. The primary obligation to address the airport noise problem always has been and remains a local responsibility." (Emphasis added) (JA. II-2, II-3).

Indeed, the airport noise problem is basically local in nature, and unique in character dependent upon the functions of many factors. All of which are never present in any two airports. To illustrate, some of these factors that obviously vary from location to location of different airports: its ambient noise, its zoning laws, residential status, topographical location, population density, land use management, length of runways, etc.

The argument of the airlines, that the exercise of airport proprietors rights would disrupt and destroy that needed uniformity of control alluded to by the court in City of Burbank v. Lockheed Air Terminal (supra), is devoid of any support in this record and is nothing more than the ipse dixit of airlines' counsel.

On page 639 of said opinion, the Court expressed the apprehension that if the Burbank ordinance were upheld and a significant number of municipalties followed suit such conduct would hamper the flexibility of the FAA in controlling traffic flow. Hence the need for one uniform rule is clearly present.

The answer to the analogy the airlines seek to draw between the courts' apprehension with the facts of the case at bar is evident. First, the nature of the power and authority of the Port Authority to issue the temporary ban is not being exercised as a police power, but that of a proprietor. Second, noise is a local problem demanding the application of purely local considerations, and incapable of solution by application of a single uniform rule national in scope - Cooley v. Board of Wardens 12 How. 299 (1851), where the court said "The nature of the subject when examined, is such as to leave no doubt as to the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants" - idem 319-320. Third, the authority of the airport proprietor, if it did produce the consequence alluded to by the Court, referred to above, would be subject to the charge by the FAA of constituting an unreasonable burden upon interstate and foreign commerce and would be promptly nullified. The airlines

consciously and deliberately declined to present this issue to the Court by its motion for summary judgment.

B.

Another reason why the airport proprietor has not been preempted in efforts to control noise at airports lies in the need for utilizing the peculiar knowledge and expertise that airport proprietors' possess in this area. The federal government, without preempting the airport proprietor's authority, can still perform its statutory functions: of maintaining a delicate balance between safety and efficiency, 49 USC 1348(a), protecting persons on the ground 49 USC 1348(c), controlling noise consistent with the highest degree of safety, 49 USC 1431 (d)(3), and still exploit the expertise of the airport operator in the solution of noise problems by examining the conduct of the airport operator in the context of its being either discriminatory or an unreasonable burden upon interstate and foreign commerce.

It is this power to check on and invalidate the airport proprietor's regulatory conduct which might encroach in either of these two areas that enables the federal government to discharge its duties and still retain the benefits of the efforts of the airport proprietor in solving the complex airport noise problem. There is no need to pre-empt the airport

proprietor's power and authority. Wisdom dictates its judicious use.

It is our belief that the federal government has not engaged in a "buck passing" operation, but rather in a very delicate balancing act directed towards enlisting the aid of all in bringing about solutions to varied and diverse problems of noise control not admitting of a single uniform solution applicable on a national scale.

Indeed, footnote 6 on page 3 (JA 53a) has been subjected to considerable criticism by the airlines. Such criticism is not justified. It is truly one of the more important indications of what Secretary Coleman did and what he did not do in his decision.

FOOTNOTE 6 OF COLEMAN DECISION - REVISITED

Secretary Coleman's footnote 6 on page 3 of his Decision (JA 53a) is wholly inconsistent with the argument that Secretary Coleman ordered the Concorde into JFK without the Port Authority's permission. In recognition of this fact, it has been suggested that footnote 6 was a purposely vague reference to the right of an airport proprietor which was in the nature of a political statement. (Transcript of Oral Argument on Appeal, p. 23). Such a characterization is wholly

unjustified. Far from being a vague reference to the proprietors' powers, the footnote was a candid acknowledgment of the possible policy and legal questions which might ensue should the Port Authority take action to ban Concorde operations at Kennedy.

It is important to note that the Secretary's Decision was made at the very time that DOT-FAA was considering the advisability of totally permitting the airport operators power to refuse landing rights. (Brief of Port Authority Defendants-Appellants, I-40 to I-42). He,therefore, characterized the Federal policy in question as one which "has hitherto prevailed". Nine months later DOT-FAA officially refused to change this policy when the formal Aviation Noise Abatement Policy Statement (ANAP) was released in November, 1976:

> "We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments."

Nor was Secretary Coleman hedging when he stated in Footnote 6 on page 3 of his February 4, 1976, Concorde decision that under such policy a local proprietor had authority "under certain circumstances" to refuse landing rights. The phrase "under certain circumstances" refers to the Department of Transportation's contention, repeatedly made, that apart from the Supremacy Clause, a proprietor's noise restrictions would be in-

valid of they were found to place an unreasonable burden on interstate or foreign commerce or to discriminate unreasonably.

SECRETARY'S DECISION DID NOT MANDATE THE USE OF JFK

Because the airlines are without visible support from any branch of the government for their contentions of preemption, they are driven to the argument that it is the decision of Secretary Coleman that effects this preemption. Considering the ambiguity of the decision, as indicated by the present controversy as to what it means, it is obvious that it fails to meet the standards that the Supreme Court has held essential in order to constitute an instrumentality of preemption.

> "**powers of the States are not to be super-ceded by the Federal Act unless that is the clear and manifest purpose of Congress***" Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947)

The foregoing is the rule required to establish preemption by legislative act. It certainly is no less stringent for an action of the executive branch of the government. The decision of Secretary Coleman does not disclose a "clear and manifest purpose" to mandate the use of JFK by the Concorde, hence there is no irreconcilable conflict with the resolution of the Port Authority - Florida Avocado Growers v. Paul 373 U.S. 132,141 (1963).

The plain language appearing on pages 3 and 4 of the decision of Secretary Coleman (JA 53a-54a) did not direct the use of JFK by the Concorde. It did not direct the Port Authority to receive the Concorde. It did direct the Federal Aviation Administrator to receive the Concorde at Dulles. Why not the same procedure at JFK? The "why" is utterly immaterial. The fact remains that no one at JFK was directed to receive the Concorde at JFK.

Attempts to explain the language of footnote 6, page 3 (JA 53a) of the decision only serve to highlight the fact that Secretary Coleman did not mandate the use of JFK by the Concorde*. Whether the language is "diplomacy", or "courtesy", or "reading the election returns", the stark naked fact remains that the use of JFK by the Concorde was not mandated by the Secretary. Such conduct would be contrary to the oft stated policy of the Dept. of Transportation which is "codified" in the Policy Statement of Nov. 18, 1976 (JA. II-1 et seq) and not in the advisory Massachusetts Opinion of the Justices dated five years earlier (1971).

*The Secretary's language describing the right of an airport proprietor to refuse landing rights under certain circumstances that "hitherto prevailed" was later clarified by him to reflect what has always been and continues to be the policy of the Department of Transportation at the present time. "For the present this remains the policy of the department" - (JA 46a) And again on November 18, 1976, a reiteration of this same policy (JA II-34). The limitation "under certain circumstances" clearly refers to the basic requirement of not being discriminatory nor an unreasonable burden on interstate or foreign commerce.

In desperation the airlines suggest that on page 61 of the decision the Secretary uses the word "order". This is true. However, this furnishes little solace to the airlines for it is apparent that the Secretary only "ordered" the amendment of the operations specifications and what he had previously done on pages 3 and 4 of his decision.

In the language of the Secretary: "I hereby order the Federal Aviation Administrator to issue on March 4, 1976, an order provisionally amending the operation specifications of British Airways and Air France, as described and subject to the terms and conditions set forth on page 3 and 4 above". This is an "order" to the Federal Aviation Administrator. To do what? To amend the operations specifications. Such amendment does not operate as a mandate to use JFK. This is clear from the numerous references in the EIS that amending the operations specifications did not carry with it the right to use any designated airport. This right to use must be obtained from the airport proprietor. All the provisions in the amendment concerning noise abatement procedures as they relate to JFK are also present with respect to Dulles. Yet Secretary Coleman found it necessary to "direct the Federal Aviation Administrator" to permit the Concorde to use Dulles. There is no equivalent order to the Port Authority relating to the use of JFK.

The attempt by the airlines to find a mandate by the Secretary for the use of JFK by the Concorde approaches the irrational. Their efforts require the complete abrogation of reason and logic substituting in their place and stead the speculation that arises from the complete and total absence of any language normally associated with the exercise of authority implicit in a directive or order. Indeed, the Court must ignore the fact that the Secretary, in speaking of using JFK, used precatory language in footnote 6 to page 3 of his decision, which is the anithesis or an order, or a directive, or a mandate. This is not the language of which orders or directives are made. It certainly cannot be argued, successfully, that Secretary Coleman did not know how to give a proper order or directive. The language he employed in directing the Federal Aviation Administrator to accept the Concorde at Dulles precludes such a contention.

An order or directive which does not specify who is to carry out or who is bound thereby is abortive - a mere brutum fulmen. It should be noted that at no place in the 61-page opinion and decision does Secretary Coleman direct, order, or mandate any actions or inaction by the Port Authority. By no stretch of the imagination can it be said that the Port Authority was ordered or directed to permit Concorde flights at JFK. The language on page 61 is plainly an order to the

Federal Aviation Administrator to amend the operations specifications as "set forth on pages 3 and 4 above".

THE OPERATIONS SPECIFICATIONS ARE NOT ORDERS

The burden is upon the airlines to establish just what is the character of operations specifications. They have referred to no authority to establish its effect one way or the other.

The action that the Secretary was called upon to take related to the amendment of the airlines' operations specifications - to use a supersonic type of aircraft in the United States on commercial flights. Because of the peculiarities of this type of aircraft such a decision required compliance with the provisions of the National Environmental Policy Act of 1969, as entailing a major decision "significantly affecting the quality of the human environment".

Amending the operations specifications, does not constitute a mandate to the Port Authority to permit the Concorde to use the facilities at JFK. By its very terms the covering letter on these operations specifications is addressed to: "Assistant Administrator, Europe, Africa, and Middle East Region". It is not addressed or directed to the

Port Authority. It is directed to the FAA. The operations specifications are a device used by the FAA whose purpose is to ensure that the involved aircraft can operate safely in U.S. airspace. See 14 C.F.R. 129.

In addition, it must be remembered that the Secretary's evaluation of the impact of the operation of the Concorde upon the quality of the environment had to be made in the context of some environment in the United States. The selection of Dulles and JFK for this purpose* is a far cry from saying that this constitutes an order or directive to the Port Authority to permit the Concorde to use JFK. Consequently, all references to what was said in the operations specifications does not fill the gap created by the total lack of any order or directive to the Port Authority to permit the Concorde to use JFK.

In reality, amending the operations specifications constitutes nothing more than granting the airlines a visa - the right to use the supersonic type aircraft in commercial operations of a limited nature - granted by the federal gov-

*There have been no surveys or studies made at JFK by the FAA or Secretary Coleman which are being duplicated by the Port Authority, as alleged by the airlines. The Port Authority has paid its consultants over $250,000 to learn the impact of the Concorde on those residents who actually live in the vicinity of airports serving the Concorde, ie., Heathrow in England and Dulles. Secretary Coleman never made such a study.
(con't)

ernment. The amendment did not purport to authorize the airlines to use any particular airport. Consequently, the Secretary directed the proprietor of Dulles to permit the Concorde to use that airport. The use of any other airport (JFK) demanded an arrangement to be made between the airlines and the appropriate airport proprietor. So also with a visa issued to a foreigner. It constitutes a prima facie determination that he is safe (not an undesirable alien). It gets the visitor to the country but it does not provide hotel accommodations. Such arrangements must be handled between the visitor and the hotel proprietor.

The law is clear that the burden of establishing preemption by the federal government is definitely upon the airlines. The argument of the airlines that had Secretary Coleman wished to recognize the power of the Port Authority to accept or reject the Concorde at JFK he could have so directed in the operations specifications. Since this recognition does not appear in the operations specifications the Port Authority is powerless to reject the Concorde.

Secretary Coleman's so called "marginally incremental impact at JFK. This refers to a cumulative effect - on 1000 flights in 24 hours. It does not evaluate the impact of the single noise incident whose intensity of noise reaches as high as 138 effective perceived noise decibels. To use the Secretary's basis of comparison is grossly misleading. The shock of the single incident is what is devastating to the resident and not the impact per 24 hours.

The shoe is on the wrong foot. The airlines argument would place the burden of proving lack of preemption on the Port Authority. Indeed, the record upon which Secretary Coleman acted, the EIS, establishes that the airlines were told, and the airlines understood, that it was necessary to obtain permission from the airport priorietor before using any airport designated in the operations specifications (JA. I-50a, I-57a). There was no need, under these circumstances, to restate what was known, understood, and had been existing fact for many years - the airlines must get permission from the airport proprietor to use his facilities.

NO IMPLIED AUTHORITY
IN THE SECRETARY TO
USE JFK WITHOUT PORT
AUTHORITY CONSENT

49 USC 1353(b) certainly gives Secretary Coleman the general power to conduct experimental test operations leading to the development of "improved aircraft" - Coxsey v. Hallaby 334 F2d 286 (10 Cir.1964). Such a statutory provision is well within the powers of Congress given it by the Commerce Clause of the U.S. Constitution.

However, it does not follow that Secretary Coleman, in implementing the authority to conduct test operations under 49 USC 1353(b) may invade the constitutional rights of either the Port Authority relating to the use of its property

or the broader constitutional rights of the residents around the perimeter of JFK relating to their property and their freedom from being involuntary subjects of experimental test operations.

There is no implied power to engage in unconstitutional acts. It is recognized that the property of the Port Authority is encumbered with a certain obligation because of the nature of its public use. But the nature of this obligation goes no further than the property shall not be used in a discriminatory manner, nor shall it be used in such fashion as to constitute an unreasonable burden upon interstate and foreign commerce.

Suffice it to say the airlines have consciously refrained from putting the undue burden on interstate commerce issue before the court for its determination.

Without exercising the right of eminent domain, the scope of authority of the federal government over the property of the Port Authority at JFK extends no further than to insure that such property will not be used in such way as to be discriminatory or to constitute an unreasonable burden upon interstate and foreign commerce. This is the alpha and the omega of the government's authority over the Port Authority's property

at JFK, any exercise of authority beyond this is unlawful.

APPLICATION OF GRIGGS DOCTRINE

Indeed, there is not much solace in the fact that only eight flights per day of the Concorde are scheduled at JFK - hence the principles of Griggs v. Allegheny County 369 U.S. 84 (19w2) and United States v. Causby 328 U.S. 256 (1946) requiring "frequent and low" flights, would not have any application. It should not be forgotten that in the Town of East Haven, et al. v. Eastern Airlines Inc. 331 F. Supp. 29 (Conn. DC 1971) liability was predicated upon planes whose height "was less than 500 feet and that they passed over several times a day" (idem p. 33). Those planes were small sub sonic jets, not the Concorde that emits noise whose intensity is eight times that of the subsonic fleet. There can be little doubt of the potential liability of the Port Authority for the tremendous damage lurking in the wings arising from the operation of the Concorde. It is no longer necessary that the flight clear the roof-top by 25 feet in order to constitute "a sufficiently direct and immediate interference with use and enjoyment of the land to constitute a taking" - 331 F. Supp. 33.

NAVIGABLE AIR SPACE MANAGEMENT

There is no doubt that the federal government has preempted "navigable air space" management. This term is presently defined to mean "airspace above the minimum altitudes of flight prescribed by regulations issued under this Chapter (Federal Aviation Program), and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 USC 1301 (26).

The plain meaning of this language described space above minimum altitudes of flight prescribed by the FAA as "navigable airspace". This definition takes care of the operation of aircraft in transit. FAA controls this exclusively.

The second part of the definition relates to the attitude of the aircraft either landing or taking-off. The basic requirement here is that of "clear space" enabling the aircraft to make a safe approach to complete a landing, and the same "clear space" enabling a plane to leave an air strip to reach the minimum altitude prescribed - U.S. v. City of New Haven 496 F2d 452 (2 Cir.1973) affirming 367 F. Supp. 1338.

In this connection the opinion of Judge Ridge in Mc Clenny v. United Air Lines Inc. 178 F. Supp. 372 (DC Mo. 1959) is instructive even though it is construing the Civil Aeronautics Act of 1938. The principles enunciated have

application here - limited preemption, interpretation of statutory language by Executive branch, effect of failure to promulgate regulations pursuant to power given by statute - as here failure to promulgate noise regulations for SST craft - 178 F. Supp. 374.

"Navigable airspace" obviously does not include the surface of runways at any airport. If it did the federal government would be the authority that determines the length of the runways and their other dimensions and characteristics. But it is undisputed that the federal government does not have this authority. Only the airport proprietor has this authority - see City of Burbank v. Lockheed Terminal 411 U.S. 624, (1973). The power and authority to control these instrumentalities is an adequate power basis for the airport proprietor to exercise the right to determine the character of service it is willing to offer to air commerce. It is immaterial that federal control may be exercised at any time that a plane is airborne.

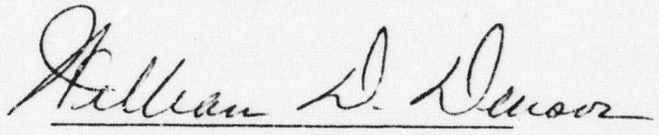
A physical trespass will certainly occur at anytime a plane touches down on any airport upon which no permission to land has been given. This record is silent as to the disruptions such conduct might entail if permitted to occur.

The airlines have cited absolutely no authority that authorizes such a trespass. Nor have the airlines cited any authority in the Secretary of Transportation to authorize such a trespass. Indeed, the Secretary was very careful in his decision to refrain from so violating the law.

CONCLUSION

The judgment below should be reversed and the cause remanded to the District Court with directions to deny the summary judgment of the plaintiffs and dismiss Counts One, Two, and Three as being insufficient to state facts upon which relief may be granted.

Respectfully submitted,



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